Mokhtar bin Abdul Razak & Anor v Shamsiah bte Saman (suing as widow and beneficiary to Abdul Razak bin Hj Senawi, deceased)

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P–04–39 OF 1995
SHAIK DAUD, NH CHAN AND ABU MANSOR JJCA
15 JANUARY 1996

Civil Law Act *— Damages — Fatal accident — Dependency claim — Dependant had received benefits under the Employees' Social Security Act 1969 — Whether s 42 of the Employees' Social Security Act 1969 barred claim against tortfeasor who was not the deceased's employer or co-worker — Civil Law Act 1956 s 7(3)(i)(d) — Employees' Social Security Act 1969 s 42*

Damages (Personal Injury or Death) *— Fatal accident — Dependency claim — Dependant had received benefits under the Employees' Social Security Act 1969 — Whether s 42 of the Employees' Social Security Act 1969 barred claim against tortfeasor who was not the deceased's employer or co-worker — Civil Law Act 1956 s 7(3)(i)(d) — Employees' Social Security Act 1969 s 42*

The respondent was the widow of the deceased who was killed in an accident involving a bus which belonged to the second appellant and was driven by the first appellant. The respondent was neither a co-worker of the first appellant nor an employee of the second appellant. The respondent filed a dependency claim and also a claim for funeral expenses ('the claims) against the appellants under s 7 of the Civil Law Act 1956 ('the CLA'). The respondent claimed that the accident was the result of the negligence of the first appellant as a servant of the second appellant. It was not disputed that the respondent was entitled to and was in fact receiving benefits under the Employees' Social Security Act 1969 ('the Act'). The appellants submitted that: (i) in view of the clear provision in s 42 of the Act, since the respondent was entitled to and was in fact receiving benefits under the Act, the bar imposed by s 42 was available to the appellants; and (ii) by virtue of the bar imposed in s 42, the respondent could not maintain her claim for dependency and funeral expenses under s 7(3)(i)(d) of the CLA. The sessions court judge was of the view that the respondent was not prohibited by s 42 from making a claim for loss of support and funeral expenses. The High Court confirmed the decision of the sessions court. The appellants appealed.

Held, dismissing the appeal with costs:

The expression 'benefit or compensation' in s 7(3)(i)(d) of the CLA was deliberately inserted to cover dependant benefits which could only be obtained under the Act and compensation under the Workmen's Compensation Act 1952. In this context, the provision of s 42 ought not to be read in isolation, but read together with the provision of s 31 of the same Act. In doing so, the bar must necessarily

be against the employer or co-worker of the insured person. Therefore, the provision of s 42 of the Act had no application to claims against third parties who were neither the employer nor the co-worker of the insured. To hold otherwise would cause an injustice to employees who had taken private personal accident policies.

In this case, the respondent was not claiming against the deceased's employer or co-worker but against a third party who had been negligent in causing the death of the deceased. Section 42 read with s 31 of the Act did not impose a bar to the dependants of the deceased claiming against third parties who were not the deceased's employer or his co-worker (see pp 497I and 498C, A–B, F–G); *Che Noh bin Yaakob v Seng Hin Rubber (M) Sdn Bhd* [1982] 1 MLJ 80 and *Tan Peng Loh v Lee Aik Fong & Anor* [1982] 1 MLJ 74 followed; *Koay Tuan & Anor v Eng Chong How & Anor* [1987] 1 MLJ 422 not followed.

[Bahasa Malaysia summary

Penentang adalah balu si mati yang telah meninggal dunia dalam suatu kemalangan yang melibatkan sebuah bas kepunyaan perayu kedua dan telah dipandu oleh perayu pertama. Penentang bukan rakan sekerja perayu pertama ataupun seorang pekerja perayu kedua. Penentang memfailkan suatu tuntutan tanggungan dan juga tuntutan untuk belanja pengurusan mayat ('tuntutan tersebut') terhadap perayu di bawah s 7 Akta Undang-Undang Sivil 1956 ('AUS'). Penentang menuntut bahawa kemalangan berlaku akibat kelalaian perayu pertama sebagai kakitangan perayu kedua. Ia tidak dipertikaikan bahawa penentang berhak kepada dan pada hakikatnya sedang menerima manfaat di bawah Akta Keselamatan Sosial Pekerja 1969 ('Akta tersebut'). Perayu-perayu berhujah bahawa: (i) memandangkan peruntukan yang jelas dalam s 42 Akta tersebut, oleh kerana penentang berhak kepada dan pada hakikatnya sedang menerima manfaat di bawah Akta tersebut, halangan yang dikenakan oleh s 42 sedia ada kepada perayu-perayu; dan (ii) menerusi halangan yang dikenakan oleh s 42, penentang tidak boleh mengekalkan tuntutannya untuk tanggungan dan belanja pengurusan mayat di bawah s 7(3)(i)(d) AUS. Hakim mahkamah sesyen berpandangan bahawa penentang tidak dilarang oleh s 42 daripada membuat tuntutan untuk kehilangan penyara dan belanja pengurusan mayat. Mahkamah Tinggi mengesahkan keputusan mahkamah sesyen. Perayu-perayu membuat rayuan.

Diputuskan, menolak rayuan dengan kos:

Ungkapan 'manfaat atau pampasan' dalam s 7(3)(i)(d) AUS sengaja dimasukkan untuk melingkungi manfaat tanggungan yang hanya boleh diperolehi di bawah Akta tersebut dan pampasan di bawah Akta Pampasan Pekerja 1952. Dalam konteks ini, peruntukan s 42 tidak patut dibaca berasingan, tetapi dibaca bersama dengan peruntukan s 31 Akta yang sama. Dalam berbuat demikian, halangan

mestilah terletak terhadap majikan atau rakan sekerja pengambil insurans. Oleh itu, peruntukan s 42 Akta tersebut tidak terpakai kepada tuntutan terhadap pihak ketiga yang bukan majikan ataupun rakan sekerja pengambil insurans. Keputusan sebaliknya akan menyebabkan ketidakadilan kepada pekerja-pekerja yang telah mengambil polisi kemalangan peribadi persendirian.

Dalam kes ini, penentang tidak menuntut terhadap majikan atau rakan sekerja si mati tetapi terhadap suatu pihak ketiga yang cuai dalam mengakibatkan kematian si mati. Seksyen 42 dibaca dengan s 31 Akta tersebut tidak mengenakan halangan kepada tanggungan si mati yang membuat tuntutan terhadap pihak ketiga yang bukan majikan ataupun rakan sekerja si mati (lihat ms 497I dan 498C, A–B, F–G); *Che Noh bin Yaakob v Seng Hin Rubber (M) Sdn Bhd* [1982] 1 MLJ 80 dan *Tan Peng Loh v Lee Aik Fong & Anor* [1982] 1 MLJ 74 diikut; *Koay Tuan & Anor v Eng Chong How & Anor* [1987] 1 MLJ 422 tidak diikut.]

Notes

For cases on damages under the Civil Law Act 1956, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2211–2257.

For cases on dependency claims, see 6 *Mallal's Digest* (4th Ed, 1992) paras 267–268.

Cases referred to

Che Noh bin Yaakob v Seng Hin Rubber (M) Sdn Bhd [1982] 1 MLJ 80 (folld)

Koay Tuan & Anor v Eng Chong How & Anor [1987] 1 MLJ 422 (not folld)

Tan Peng Loh v Lee Aik Fong & Anor [1982] 1 MLJ 74 (folld)

Legislation referred to

Civil Law Act 1956 ss 7, 7(3)(i)(d), 8

Employees' Social Security Act 1969 ss 31, 42

Workmen's Compensation Act 1952

Appeal from: Civil Appeal No 12–31 of 1993 (High Court, Penang)

P Navaratnam (*Vello & Associates*) for the appellants.

Annie Santha Subramaniyam (*Baldev Bhar*) for the respondent.

Cur Adv Vult

Shaik Daud JCA (delivering the judgment of the court): This is an appeal from the decision of the Penang High Court which had confirmed the decision of the Penang Sessions Court in allowing a claim by the widow of a deceased person who had died in a road accident. At first glance, this claim appeared to be a straightforward case of an accident claim by the widow of the deceased person involved in the accident. This claim, apart

from being a claim under s 7 of the Civil Law Act 1956 ('the CLA'), also involved the provision of s 42 of the Employees' Social Security Act 1969, popularly known as 'the Socso Act'. A

The facts of the case were not in dispute. On 2 April 1992, one Abdul Razak bin Hj Senawi — while riding his motorcycle home from work — was involved in a fatal accident with a bus belonging to United Traction Co Sdn Bhd, the second appellant and driven by Mokhtar bin Abdul Razak, the first appellant. B

Shamsiah bte Saman, the widow ('the respondent'), filed a dependency claim and a claim for funeral expenses against the appellants under s 7 of the CLA. The respondent claimed that the accident was as a result of the negligence of the first appellant as a servant of the second appellant. C

It was also not disputed that the respondent was entitled to — and was in fact receiving — benefits under the Socso Act. The appellants in the sessions court, the High Court and this court contended that since the respondent was entitled to, and was in fact receiving, benefits under the Socso Act, s 42 of that Act barred her from claiming similar benefits from them. The learned sessions court judge was of the view that the respondent was not prohibited by s 42 of the Socso Act from making a claim under the Act. The appellants' appeal to the High Court was dismissed and the High Court confirmed the decision of the learned sessions judge. D

It is pertinent at this stage to set out the provisions of s 42 of the Socso Act, which reads: E

> When a person is entitled to any of the benefits provided by this Act, he shall not be entitled to receive any similar benefit admissible under the provisions of any other written law.

Learned counsel for the appellants submitted that in view of this clear provision, and since the respondent was entitled to — and was in fact receiving — similar benefits under the Socso Act, the bar imposed by s 42 of the Socso Act was available to the appellants. He cited the case of *Koay Tuan & Anor v Eng Chong How & Anor* [1987] 1 MLJ 422. In that case, the plaintiffs were the administratrix and administrator of the estate of one Teh Keat Leng, deceased, who worked as a supervisor for Seng Hing Sawmill. The deceased was killed when a timber load fell on him from a lorry driven by first defendant and owned by second defendant. As the deceased was insured under Socso by Seng Hing Sawmill, the first plaintiff who was the widow of the deceased had been — and was still — receiving dependant benefits under the Socso Act. The plaintiffs had also, pursuant to ss 7 and 8 of the CLA, filed a suit claiming damages for the dependants of the deceased against the first defendant as the driver of the lorry and the second defendant as his employer. It must be noted that the second defendant was not the employer of the deceased and the first defendant was also not his co-worker. F G H I

One of the issues before the court was whether an amount of general damages for loss of support recoverable by the plaintiffs under s 7 of the CLA from a party who was neither his employer nor his co-worker amounted to a similar benefit admissible under the provisions of any other written

law within the meaning of s 42 of the Socso Act. The court held that (at p 424):

> ... an award of general damages in respect of a dependency claim under s 7 of the Civil Law Act 1956 being intended to compensate *the dependants* of the deceased in respect of *loss of support* is similar to 'dependants' benefit' within the meaning of s 15(1)(c) of the Act.
>
> Accordingly, the bar imposed by s 42 of the Act is available to the defendants in so far as the claim for loss of dependency under s 7 of the Civil Law Act 1956 is concerned.

Section 31 of the Socso Act as amended provides:

> An insured person or his dependants shall not be entitled to receive or recover from the employer of the insured person, or from any other person who is the servant of the employer, any compensation or damages under any other law for the time being in force in respect of an employment injury sustained as an employee under this Act.

From this provision it would appear, with respect, that the decision in *Koay Tuan*'s case had widened the scope of the bar to include third parties who are not the insured's employer or his co-worker.

Section 42 of the Socso Act appears to afford a complete bar to a claim under s 7 of the CLA. Section 7, however, was amended in 1975. The amended provision is in the proviso (i)(d) to s 7(3), which provides:

> Provided that —
>
> (i) in assessing the damages there shall not be taken into account —
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) any sum which has been or will or may be paid under any written law relating to the payment of any benefit or compensation whatsoever, in respect of the death;

It was submitted by learned counsel for the appellant that in spite of the amended provision as above, and by virtue of the bar imposed in s 42 of the Socso Act, the respondent in the present appeal could not, therefore, maintain her claim for dependency and funeral expenses under s 7(3)(i)(d) of the CLA. He added that the facts in the present appeal were similar to the facts in *Koay Tuan*'s case and the decision in that case must therefore apply to the present appeal. He further submitted that the amended s 7(3)(i)(d) of the CLA although later in time has not by implication abrogated the special earlier provisions of s 42 of the Socso Act, based on the well-known maxim *generalia specialibus non derogant*, ie a general later law does not abrogate an earlier special one by mere implication.

It is not disputed that there is no express provision in s 7(3)(i)(d) of the CLA excluding the Socso Act or any other Act for that matter but the expression 'benefit or compensation' to our minds was deliberately inserted to cover dependant benefits which can only be obtained under the Socso Act and compensation under the Workmen's Compensation Act 1952. To our minds, the language used must necessarily refer to benefits under

Socso Act. In our view, the provisions of s 42 of the Socso Act have no application to claims against third parties who are neither the employer nor the co-worker of the insured. To hold otherwise would cause an injustice to employees who had taken private personal accident policies, since the benefits they could claim under the personal accident policies would be tantamount to similar benefits under the Socso Act and the bar of s 42 of the Socso Act would deprive them of the benefits for which they had been paying premiums for a number of years, and would also allow third parties who negligently caused the death of the insured to go scot-free. We are of the view that the provisions of s 42 of the Socso Act ought not to be read in isolation. It should be read with the provisions of s 31 of the Socso Act. In doing so, it can be seen at once that the bar must necessarily be against the employer or co-worker of the insured person. It can be seen in two other cases, ie *Che Noh bin Yaakob v Seng Hin Rubber (M) Sdn Bhd* [1982] 1 MLJ 80 and *Tan Peng Loh v Lee Aik Fong & Anor* [1982] 1 MLJ 74, where the court held that s 42 is a complete bar as the claims in the two cases were against the employer of the insured. Therefore, the dependants ought not to be allowed to get double benefits from the employer. Having obtained benefits under the Socso Act, they are therefore barred from claiming similar benefits from the same employer. In the light of this, we would agree with the reasonings and finding of the learned High Court judge, we find ourselves, with respect, unable to agree with the decision in *Koay Tuan*'s case which held that a workman subjected to benefits under the Socso Act is barred from claiming under s 7 of the CLA against third parties who are not his employer or co-worker.

In the present appeal, the respondent herein was not claiming against the deceased's employer or co-worker but against a third party who had been negligent in causing the death of the insured.

We would agree with the learned High Court judge that s 42 read with s 31 of the Socso Act in no way impose a bar to the dependants of the insured to claim against third parties who are not the insured's employer or his co-worker. We would therefore dismiss the appeal with costs and the deposit is to go towards costs to be taxed if not agreed.

Appeal dismissed.

Reported by Koay Sook Kuan